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PUSH AND PULL: APPLICATION OF COMMUNITY LAW IN THE PARTNER STATES OF THE EAST AFRICAN COMMUNITY

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Abstract

The Treaty for the Establishment of the East African Community (the EAC Treaty) was signed on 30 November 1999 between the Republics of Kenya, Uganda and the United Republic of Tanzania. Burundi and Rwanda acceded to the Treaty in 2007 and South Sudan in 2016. The East African Community (EAC) is the fastest growing Regional Economic Community (REC) in Africa, with a comparatively well-functioning Customs Union, a partly functioning Common Market, a fast-approaching Monetary Union, and an ultimate destination of a Political Federation.

The EAC Treaty is an international treaty and its international status has been canvassed both by the East African Court of Justice (EACJ) – the EAC’s judicial organ – and the national courts of Partner States. As might be expected, the former has been progressive and supranationalist in its interpretation of the Treaty while the latter have dabbled in a ‘push and pull’ approach attempting, on the one hand, to limit the application of the Treaty in order to protect constitutional supremacy while fully accepting, on the other hand, its application in regard to ordinary national legislation.

Amidst this discourse, an appreciation of the generally binding nature of ratified international treaties has emerged among national courts so that EAC law (herein referred to as Community law) – itself a manifestation of an international Treaty – could be a major beneficiary.

Keywords: EAC law; Community law; Application of EAC Law; EAC Law and National Constitutions; Doctrine of Primacy of EAC Law; Direct Effect of EAC Law

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1. Introduction

This article is structured in six parts, with the central argument that Community law has an elevated status in national legal regimes into which it has been legislatively and judicially well received subject only to fundamental norms despite, in conciliatory terms, general national adherence to external norms across the Partner States. Part 2 outlines the history, institutions, objectives, principles and core legislation of the EAC, setting out the background and legislative framework of Community law. Part 3 discusses the EACJ's interpretation of Community law's status, highlighting that Court's glorification of Community law as a supranational legal regime. Part 4 describes the national legislative reception of Community law in the Partner States, establishing the national democratic premise of Community law. Part 5 elaborates the national judicial reception of Community law, portraying a general acceptance among national courts of Community law's primacy and applicability. Part 6 examines the instances of national judicial resistance to Community law, demonstrating a determined approach among national courts to preserve national constitutionalism. This trend is contrasted, in Part 7, with the EACJ's judicial restraint in disputes bearing constitutional connotations, on the one hand and, on the other hand, in Part 8, national courts' emerging deference to international law, displaying prospects of a non-confrontational future for the Community and Constitutional legal regimes – attainable through the mechanism of international law.

2. Background of the East African Community

The idea of East African integration first crystallised in 1967 through the Treaty for East African Co-operation signed between Kenya, Uganda and Tanzania. That Co-operation collapsed in 1977 at a time of dwindling political will for the integration project, economic policy differences among the Partner States, private sector and civil society alienation from the integration process and inter-State ideological differences.¹ With a new generation of political leaders in the 1990's, the integration process was re-ignited and the EAC was

¹ Preamble, EAC Treaty. See also, W. Masinde and C.O. Omolo, 'The Road to East African Integration' in E. Ugirashebuja and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) 1-21, 16.

‘re-born’ with the signing of the EAC Treaty in 1999 between the same Partner States as in 1967, with Burundi and Rwanda subsequently joining in 2007 and South Sudan in 2016.

The EAC’s institutional framework is a structural transposition of the equivalent national democratic set-up, with an executive arm – the Heads of State Summit, EAC Secretariat, EAC Council of Ministers; a legislative arm – the East African Legislative Assembly (EALA); and a judicial arm – the EACJ.²

The Community’s objective is ‘to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit’.³ Accordingly, the Partner States have undertaken to establish among themselves a customs union, common market, monetary union and, ultimately, a political federation.⁴

The EAC is governed by a comprehensive set of principles including good governance, human rights protection, peaceful co-existence and good neighbourliness, peaceful settlement of disputes as well as people-centred and market driven co-operation. These are set out in the EAC Treaty.⁵ That Treaty is also a foundation for a whole host of Protocols and secondary Community legislation.⁶ Key among these is the Protocol for the Establishment of the East African [Community] Customs Union (EAC Customs Union Protocol) 2005, the Protocol for the Establishment of the East African Community Common Market (EAC Common Market Protocol) 2010, the East African Community Customs Management Act (EAC CMA) 2004, among others.⁷

² Article 9(1) EAC Treaty.

³ Article 5(1) EAC Treaty.

⁴ Article 5(2) EAC Treaty.

⁵ Articles 6 and 7 EAC Treaty.

⁶ See Articles 16, 62 and 151 EAC Treaty.

⁷ See, generally, J. Döveling and others (eds), *Harmonisation of Laws in the East African Community* (Law Africa 2018).

3. The EACJ's Supranationalist Perception of Community Law

In exercising its jurisdiction to interpret the EAC Treaty,⁸ the EACJ has uplifted Community law in three fundamental ways. First, it has reiterated the international status of the EAC Treaty and rejected attempts by Partner States to cite conflicting national legislation as excuses for breaching that Treaty. For instance, in *Henry Kyarimpa v Attorney General of Uganda (No. 3)*,⁹ the EACJ Appellate Division, while dismissing the respondent's assertion that the Court's jurisdiction to determine EAC Treaty breaches did not extend to examining national law stated that, 'the characterization of an act of the State as internationally wrongful – which is what a breach of a treaty is – is governed by international law, and is not always necessarily [consistent] with the characterization of the same act as lawful by internal law.'¹⁰ And in *Prof. Anyang' Nyong'o & others v Attorney General of Kenya & others (No. 2)*,¹¹ the EACJ, while rejecting the respondent's submission that national law could not be overridden by international law once again noted that,

... a state party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so. The principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties¹²

Secondly, relying upon EAC Treaty provisions on the status and application of Community law in the Partner States,¹³ the EACJ has proclaimed that Community law must take precedence over incompatible national legislation, bestowing upon it a coveted pre-eminence within national legal orders. For example, in *Prof. Anyang' Nyong'o & others v Attorney General of Kenya & others (No. 2)*,¹⁴ the Court held that Community law takes precedence over conflicting national law, finding that the Kenyan rules for electing EALA representatives, insofar as they were inconsistent with the requirements set

⁸ Articles 23 and 27 EAC Treaty.

⁹ [2016] EACJ Appeal No. 6 of 2014.

¹⁰ *Henry Kyarimpa (No. 3) (n 9), para 70, 30.*

¹¹ [2007] EACJ Reference No. 1 of 2006.

¹² *Prof. Anyang' Nyong'o (No. 2) (n 11), 41.*

¹³ Particularly, Articles 8(4)-(5) and 16 EAC Treaty.

¹⁴ *Prof. Anyang' Nyong'o (No. 2) (n 11).*

out in Article 50 EAC Treaty infringed that Treaty and the elections held under them were void.¹⁵ In so doing, the Court established a doctrine of primacy of Community law over conflicting national law. This doctrine was set out more firmly in *Samuel Mukira Muhochi v Attorney General of Uganda*,¹⁶ where the EACJ, while determining a dispute against Uganda for breaching the provisions on freedom of movement of persons under the EAC Common Market Protocol, held that that Protocol takes precedence over Uganda's Citizenship and Immigration Control Act, emphasizing that, '[I]ike in any other Partner State, once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became directly enforceable within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol.'¹⁷

Insofar as the EAC Common Market Protocol was enacted subsequent to Uganda's Citizenship and Immigration Control Act, the Court in *Samuel Mukira Muhochi* introduced an elasticity within the doctrine of primacy to the extent that Community law shall override not only national laws adopted subsequent to its enactment but also those adopted prior. Similarly, insofar as the Court held that Community law takes precedence over national legislation adopted subsequent to its enactment, the Court effectively stretched the doctrine to cut through the national doctrines of implied repeal and judicial precedent to the extent that a national law adopted subsequent to a Community law shall not, as in national legal systems, impliedly repeal that law and a precedent that is incompatible with Community law shall not, as ordinarily in national legal proceedings, apply in a dispute involving that Community law.¹⁸ This case also demonstrated that the doctrine of primacy is not limited to the EAC Treaty but stretches across the entire landscape of Community law, including Protocols and secondary legislation.

¹⁵ The Court strongly relied on the case law of the Court of Justice of the European Union (CJEU), particularly, *Van Gend en Loos* [1963] ECR 1, *Flamino Costa v ENEL* [1964] ECR 585 and *Simmenthal* [1978] ECR 629. The Court also cited the House of Lords (now UK Supreme Court) decision in *R v Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603. For a detailed analysis of this case law and the doctrines of primacy and direct effect in EU law, see A. Cuyvers, 'The Scope, Nature and Effect of EU Law' in Ugirashebuja (n 1), 161-181.

¹⁶ [2013] EACJ Reference No. 5 of 2011.

¹⁷ *Samuel Mukira Muhochi* (n 16), para 50, 27.

¹⁸ See E.S Ssemmanda, *Regional Integration Law in the East African Community and European Union* (Clep EAI 2018) 139-140 and 167-171.

Thirdly, the EACJ has emphasised that Community law can be invoked by individuals before their national courts, thereby establishing a doctrine of direct effect of Community law. In *East African Law Society v Secretary General of the East African Community (Jurisdiction to Interpret)*,¹⁹ the EACJ had to determine whether companies and natural persons could rely on the provisions of the EAC Common Market Protocol before their national courts. The Court held that they could, declaring that ‘the primary responsibility to implement Community legal instruments lies with Partner States. As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impracticable if their national courts had no jurisdiction over disputes arising out the implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.’²⁰ The EACJ Appellate Division reiterated this position in *Attorney General of Uganda v Tom Kyahurwenda*,²¹ where it agreed ‘with the postulation of the law by the First Instance Division of this Court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them.’²²

Accordingly, individuals need not look only to the EACJ for protection against Community law breaches as in the EACJ’s interpretation Community law can be invoked directly before their national courts. However, in such proceedings, national courts must, if they determine that the question of Community law raised is necessary for the resolution of the dispute before them, make a preliminary reference to the EACJ,²³ unless where the question has been previously addressed by the EACJ in a similar dispute before that Court or the answer to the question is obvious.²⁴

On account of this carefully developed jurisprudence by the EACJ, the Court has cemented the place of Community law above ordinary national law and secured its application before national courts – through the doctrines of

¹⁹ [2013] EACJ Reference No. 1 of 2011.

²⁰ *East African Law Society (Jurisdiction to Interpret)* (n 19), 27.

²¹ [2015] EACJ Case Stated No. 1 of 2014.

²² *Tom Kyahurwenda* (n 21), para 54, 22. Once again, both Divisions of the Court relied heavily on CJEU case law on direct effect, particularly, *Van Gend en Loos* (n 15).

²³ Article 34 EAC Treaty and Rule 126 EACJ Rules of Procedure.

²⁴ See *Attorney General of Uganda v Tom Kyahurwenda* (n 21). See also, Ssemmanda (n 18), Ch 19–20 and E. Ugirashabuja, ‘Preliminary References under EAC Law’, in Ugirashabuja (n 1), 265–274.

primacy and direct effect.²⁵ However, despite the EACJ's supranationalist perception of Community law, its application within the Partner States can only be achieved through legislative mechanisms rather than judicial proclamation, making it critical next to consider how parliaments in the Partner States have regulated its application.

4. National Legislative Reception of Community Law

The EAC Treaty and other secondary sources of Community law being non-national normative creatures must, like all other manifestations of international law, be received into the Partner States' legal systems through legislative conduit pipes – by a process called 'incorporation'.²⁶ Conversely, the EAC Treaty requires the Partner States to confer upon the Community domestic legal personality and to bestow upon Community law the force of law within their territories.²⁷ Accordingly, Uganda and Tanzania, as dualist States (States in which international treaties are not directly applicable but must be received through domestic legislative instruments)²⁸ have incorporated the EAC Treaty through, respectively, the East African Community Act 2002 (Uganda EAC Treaty Act 2002) and the Treaty for the Establishment of the East African Community Act 2001 (Tanzania EAC Treaty Act 2001).²⁹

The Uganda EAC Treaty Act 2002, enacted 'to give the force of law to the Treaty in Uganda',³⁰ provides that, '[t]he Treaty as set out in the Schedule to this Act shall have the force of law in Uganda',³¹ and 'all rights, powers, liabilities, obligations and restrictions from time to time provided for by or

²⁵ See also R. F Opong, *Legal Aspects of Economic Integration in Africa* (CUP 2011) 39-50.

²⁶ See P. Verdier and M. Versteeg, 'Modes of Domestic Incorporation of International Law' in W. Sandholtz and C. A Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar Publishing, 2017) 149-175.

²⁷ Article 8(2) EAC Treaty.

²⁸ M. Killander and H. Adjolooun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in M. Killander (ed), *International Law and Domestic Human Rights in Africa* (Pretoria University Press, 2010) 3-22, 11. See, for Uganda, Article 123 Constitution of the Republic of Uganda, 1995 (as amended in 2005) and; for Tanzania, Article 63 Constitution of the United Republic of Tanzania, 1977.

²⁹ See, respectively, B. Kabumba, 'The Application of International Law in the Ugandan Judicial System: A Critical Enquiry', in Killander (n 28), 83-107; and C. Murungu, 'The Place of International Law in Human Rights Litigation in Tanzania' in Killander (n 28), 57-69.

³⁰ Preamble, Uganda EAC Treaty Act 2002.

³¹ Section 3(1) Uganda EAC Treaty Act 2002.

under the Treaty shall be recognised and available in the law and be enforced and allowed in Uganda.’³² In legislative terms, parliament through this Act conferred upon the EAC Treaty binding force within the national legal system and, quite significantly, automated the applicability of subsequent Community enactments, including subsequent Protocols, Regulations, Directives and Acts of the Community, so that their domestic applicability need not be re-legislated as and when they are enacted, as the case law in Part 5, below, will show.

On the other hand, the Tanzania EAC Treaty Act 2001 is framed in more restricted terms, providing only that its enactment is to give ‘effect to certain provisions specified in the said Treaty’,³³ and that ‘[t]he provisions of any Act of the Community shall ... have the force of law in the United Republic.’ It may appear that parliament intended to give Community law a narrow application in Tanzania by only expressly recognizing the applicability of Acts of the Community – enacted through the EALA’s legislative process³⁴ – to the exclusion of other sources of EAC law – including Regulations and Directives of the EAC Council of Ministers and, incredibly, the EAC Treaty in its entirety plus its Protocols. That question has not been directly addressed by Tanzanian courts, but it would appear, as the case law discussed in Part 5, below, will show, that Tanzanian courts consider the EAC Treaty and, thereby, the full body of Community law applicable in Tanzania.

Kenya originally incorporated the EAC Treaty through its Treaty for the Establishment of the East African Community Act 2000 (Kenya EAC Treaty Act 2000). That Act had been drafted in terms similar to the Tanzania EAC Treaty Act 2001, providing only that its enactment is to give ‘effect to certain provisions contained in the said Treaty’,³⁵ and that ‘[t]he provisions of any Act of the Community shall ... have the force of law in Kenya.’³⁶ Kenyan courts had interpreted this to mean that parliament only intended to incorporate the EAC Treaty in limited terms rather than its entirety.³⁷ However, that interpretation is presently untannable as Kenya, previously a dualist State, now appears to have converted into a monist State (a State in which inter-

³² Section 3(2) Uganda EAC Treaty Act 2002.

³³ Preamble, Tanzania EAC Treaty Act 2001.

³⁴ See Article 62 EAC Treaty.

³⁵ Preamble, Kenya EAC Treaty Act 2000.

³⁶ Section 8 Kenya EAC Treaty Act 2000.

³⁷ See *Prof. Anyang’Nyong’o & others v Attorney General of Kenya & Anor (Treaty Amendments)* [2007] eKLR Petition 49 of 2007.

national treaties are directly applicable without recourse to domestic legislative incorporation)³⁸ by virtue of its new 2010 Constitution,³⁹ so that the EAC Treaty is now directly applicable in Kenya by virtue of a constitutional provision rather than through the Kenya EAC Treaty Act 2000. Article 2(6) of the 2010 Constitution provides that, “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.’ The EAC Treaty having been ratified by Kenya now derives its force of law in Kenya from this provision. To the extent that the Kenya EAC Act 2000 remains an unrepealed Act of parliament and, thereby, still functionally applicable, Kenyan courts, as the case law in Part 5, below, will show, must now interpret that Act in harmony with the EAC Treaty, so that there is no longer room for excluding that Treaty’s full application within the national legal regime.

Equally, the EAC Treaty applies in Burundi, Rwanda and South Sudan via constitutional provisions – as these, like Kenya, are monist states. Articles 276 to 279 of the new Burundian Constitution 2018 provide for ratification of international treaties, participation in regional blocs and direct application of ratified international treaties in Burundi, among which is the EAC Treaty having been ratified by Burundi. The Constitution’s preamble also affirms ‘the commitment of Burundi to the Treaty Establishing the East African Community’.

According to Article 168 of the Rwandan Constitution 2003 (as revised in 2015), ‘international treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under the first paragraph of Article 95 of that Constitution.’ Therefore, the EAC Treaty having been ratified by Rwanda applies domestically through this provision, with the Constitution setting out a hierarchy in Article 95 that places only the Constitution and organic laws above ratified international treaties.

³⁸ Killander and Adjolahoun (n 28), 3-22, 5.

³⁹ On pre-2010 dualism, see J.O. Ambani, ‘Navigating Past the “Dualist Doctrine”: The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya’, in Killander (n 28), 25-35. On post-2010 monism, see *Karen Njeri Kandie v Alassane Ba & Anor* [2017] eKLR Supreme Court Petition No. 2 of 2015. Although the Supreme Court in *Karen Njeri Kandie* declined to determine whether Kenya was post-2010 a dualist or monist state in international law, the court was ready to admit that Kenya was a dualist state pre-2010, see para 53. At least the Court of Appeal has accepted that, ‘Kenya is traditionally a dualist system ... However, this position may have changed after the coming into force of our new Constitution.’ See *David Njoroge Macharia v Republic* [2011] eKLR Criminal Appeal No. 497 of 2007, 10. On any analysis, and having regard to Kenya’s Treaty Making and Ratification Act 2012, it is difficult to conclude otherwise than that Kenya is a monist state post-2010.

South Sudan's Transitional Constitution 2011 provides guiding principles on foreign policy in Article 43 that include promotion of international co-operation, achievement of African economic integration through regional blocs and respect for international law and treaty obligations. More substantively, Article 57(d) confers upon the National Legislative Assembly power to ratify international treaties, conventions and agreements. On those grounds, South Sudan having ratified the EAC Treaty, it can be said that the Treaty is now directly applicable within the national legal regime.

Although non-national law can become national law through legislative fiat – either through a parliamentary statute or constitutional declaration – its full application in national legal systems ultimately lies in the hands of national courts, which – through disputes before them – shape its domestic trajectory. We now turn to consider how national courts in the Partner States have treated Community law.

5. National Judicial Reception of Community Law

To a fundamental extent, national courts in the EAC have charted a clear path for Community law in national legal systems by accepting the direct application of Community law and adopting EACJ jurisprudence, thereby legitimizing the authority of Community law in the Partner States. First, in *Kamurali Jeremiah Birungi & Anor v Attorney General of Uganda & Anor*,⁴⁰ the Ugandan High Court while determining a dispute challenging national rules for the election of EALA representatives for contravening the requirements of Article 50 EAC Treaty, proclaimed that, 'Uganda is part of the East African Community (EAC) and a signatory to the Treaty. The Treaty was domesticated in Uganda through the enactment of the East African Community Act 13 of 2002. Uganda is therefore bound by the provisions of the Treaty.'⁴¹ On similar facts in *Jacob Oulanyah v Attorney General of Uganda*,⁴² Uganda's Constitutional Court found that the impugned provisions breached Article 50 EAC Treaty.

Secondly, in *East African Development Bank v Blueline Enterprises Ltd*,⁴³ the East African Development bank (EADB) appealed against a garnish-

⁴⁰ [2013] National Assembly Election Petition No. 2 of 2012 UGHC 1.

⁴¹ *Kamurali Jeremiah Birungi* (n 40), 25.

⁴² [2008] Constitutional Petition No. 28 of 2006.

⁴³ [2011] Civil Appeal No. 110 of 2009.

ee order issued against its locally held financial assets on the ground that the bank's Treaty of establishment, incorporated into national law through national legislation,⁴⁴ accorded its assets judicial immunity. The Court of Appeal accepted that contention, invoking Article 130 EAC Treaty that requires Partner States to honour their international obligations, and acknowledging that Treaty's full applicability in Tanzania by holding that, 'Tanzania has shown its total and unflinching commitment to its obligations under various international agreements, through Article 130 of the Treaty for the Establishment of the East African Community. This Treaty is part of Tanzania's municipal laws.'⁴⁵ Coming from the highest court of the land, this express acknowledgement that the EAC Treaty – and therefore the Community law, which it manifests – is part of Tanzania's national law is perhaps the highest national judicial accreditation of Community law by any court in the Partner States.⁴⁶

Thirdly, in *R v Kenya Revenue Authority ex parte Mohamed Sheikh t/a MSB Enterprises*,⁴⁷ the applicant, relying on provisions of the national Customs and Excise Act, challenged an import tax assessment based on the Community's EAC CMA 2004, placing the Kenyan High Court at the centre of a dispute between Community and national legislation. Yielding to Community law, the court held that, '[o]ne objective of the East African Community is to establish a Customs Union amongst its Member States ... [the] EAC CMA is a statute providing for the management and administration of customs and for related matters and is applicable to each of the Partner States ... [the] EAC CMA binds the Partner States of the Community in relation to customs matters.'⁴⁸ Rejecting the applicant's invitation to apply the conflicting national customs law, the court held that if a particular customs issue is regulated both by Community and national law but the two are incompatible in the specific circumstances, the Community law would take precedence over the national law to the extent of that incompatibility.⁴⁹

⁴⁴ The East African Development Bank Act 1984 (as amended by the Finance Act 2005).

⁴⁵ *Blueline Enterprises* (n 43), 24.

⁴⁶ Ssemmanda (n 18), 131.

⁴⁷ [2012] eKLR Miscellaneous Civil Application 625 of 2009.

⁴⁸ *Ex parte Mohamed Sheikh* (n 47), para 18, 5.

⁴⁹ Although the EAC CMA in section 253 specifically proclaims precedence over national customs laws, the court's decision – to the extent that Articles 8(4)-(5) and 16 EAC Treaty specifically proclaim precedence of the general body of Community law over incompatible national laws – is a proper exemplar of Kenyan courts' acceptance of the doctrine of primacy.

Fourthly, in *Autopress Sarl v Rwanda Revenue Authority*,⁵⁰ the Rwandan Supreme Court in a dispute where a car importer had challenged punitive action taken by the Rwanda Revenue Authority (RRA) on the basis of national customs law in circumstances where Community customs law – the EAC CMA – would have required prior admission by the assessed entity of the allegations lodged against it, held that national law could not be applied in contravention of Community law. The court stated that, ‘as long as *Autopress Sarl* did not admit of the offence it was accused of by RRA, provisions of [section] 219 of [the] East African Community Customs Management Act ... should have applied; therefore it should not have been charged taxes in the way RRA has done so in respect to an offence it does not admit.’⁵¹ This decision, coming from the highest court of the land and bearing significant precedential value as Supreme Court decisions are, uniquely within the Rwandan legal system, binding on all other courts,⁵² reinforces the trend of positive national judicial reception of Community law.

Because by their nature they embody the doctrines of primacy and direct effect of Community law, these national case law illustrations confirm an intentional national judicial hospitality – both at first instance and appellate levels – of Community law in the Partner States which, given national courts’ traditional role of breathing life into legislation, is essential for Community law’s viability, authority and legitimacy. Moreover, given that national courts are ordinarily the architects of national legal parameters and are integral in shaping domestic legal attitudes among lawyers, academics, legislators, judges across all levels and law students,⁵³ it is difficult to see how Community law could take shape domestically without their effort.

However, national courts play another significant role domestically: they are the guardians of national constitutions. In exercising that role, national courts have out rightly rejected the primacy of Community law over national constitutions, thereby putting up – albeit on justifiable grounds and in a commendably non-confrontational fashion – a determined resistance to the application of Community law in the Partner States.

⁵⁰ [2016] 1 RLR.

⁵¹ *Autopress Sarl* (n 50), para 16.

⁵² See Article 47 Organic Law N° 03/2012/OL of 13/06/2012 Determining the Organization, Functioning and Jurisdiction of the Supreme Court.

⁵³ See D. L Sloss and M. P van Alstine, ‘International Law in Domestic Courts’, in Sandholtz and Whytock (eds) (n 26), 79-115.

6. National Judicial Resistance to Community Law

Despite the fact that national courts have accepted the primacy of Community law over incompatible national laws, for now it is clear that they will not accept Community law's primacy over their national constitutions. This inevitably creates two categories of national legislation in regard to the doctrine of primacy, namely: (a) ordinary national legislation – which is national legislation other than the constitution, and over which national courts have clarified Community law takes precedence; and (b) national constitutions – which are different from ordinary legislation not only in structure but also in authority and function, and over which national courts have rejected Community law's primacy.

The first example of judicial resistance on constitutional grounds is *Uganda v Gurindwa & others*,⁵⁴ where the High Court recalled that the Ugandan Constitution declares its supremacy over any other law inconsistent with it.⁵⁵ The government was prosecuting the accused persons under the EAC CMA 2004 – the Community's customs legislation – for false representations and fraudulent evasion of customs duties, with the burden of proving the place of origin of the goods and payment of proper customs duties resting on the accused under the Act.⁵⁶ The accused argued that by placing the burden of proof on them the EAC CMA 2004 contravened their right to presumption of innocence under the Ugandan Constitution.⁵⁷ The question was whether, on the basis of section 253 EAC CMA 2004 which accords the Act precedence over any conflicting national laws, that Act would be applied in favour of the Ugandan Constitution, particularly in regard to the constitutional supremacy clause – Article 2(2) of the Ugandan Constitution.

The court held that the Community Act did not contravene the accused's right to presumption of innocence as the Ugandan Constitution specifically permits placing upon an accused person the burden of proving particular facts.⁵⁸ However, the court, commenting on section 253 EAC CMA 2004, highlighted the supremacy of the Ugandan Constitution over Community legislation, proclaiming that, 'section 253 of the East African Community

⁵⁴ [2012] UGHC 166.

⁵⁵ Article 2(2) Ugandan Constitution.

⁵⁶ Section 203 EAC CMA 2004.

⁵⁷ Article 28(3)(a) Ugandan Constitution.

⁵⁸ Article 28(4)(a) Ugandan Constitution.

Customs Management Act provides for precedence over the Partner States' laws with respect to any matter to which its provisions relate [but] if there is any conflict in the few articles of the Constitution that provide for policy making in matters of taxation as provided in Articles 191 and 192 of the Constitution, the answer is provided in Article 2(2) of the Constitution.' That answer, according to Article 2(2) of the Ugandan Constitution, would be that the Constitution takes precedence.

Secondly, in *Crywan Enterprises Ltd v Kenya Revenue Authority*,⁵⁹ the Kenyan High Court heard a challenge against the constitutionality of the forfeiture of uncustomed goods under the EAC CMA 2004 insofar as forfeiture entails a deprivation of property. The petitioner claimed that this mechanism – a creature of Community law – was contrary to the individual's right to property – a creature of the Kenyan Constitution – once again placing at the centre of the dispute the question whether a provision of Community law would take precedence over a constitutional provision. Although the court found that the mechanism itself was not unconstitutional given the procedural protections entailed in the relevant Community law, it indicated indisputably that it would have upheld the constitutional provisions had it found the contrary, stating that, 'I do not find that sections 210 and 211 of [the] EAC CMA [are] unconstitutional or in violation of Article 40(2) [of the Constitution] in the manner suggested by the petitioner.'⁶⁰ With a formulation such as that, it is impossible to conclude otherwise than that the court had assessed the compatibility of the impugned Community law against the national Constitution, signifying that it considered the latter superior to the former.

The Kenyan Supreme Court reiterated this position in much clearer terms, albeit in the general context of international law, in *Karen Njeri Kandie v Alassane Ba & Anor*,⁶¹ where the status of ratified international treaties (which in Kenya include the EAC Treaty) in the national legal system was in question. Ms. Kandie instituted proceedings against the Managing Director of Shelter Afrique – an international organisation in Nairobi – for physically assaulting her while at work.⁶² He made a successful preliminary objection on the basis that he had immunity from judicial process conferred upon him by

⁵⁹ [2012] eKLR Judicial Review 96 of 2008.

⁶⁰ *Crywan Enterprises* (n 59), para. 39, 9.

⁶¹ *Karen Njeri Kandie* (n 39).

⁶² The organization itself was also enjoined as a 2nd respondent.

the organisation's constitutive Charter ratified by Kenya in 1985. Having been a dualist state at the time of ratification,⁶³ Kenya domesticated the constitutive Charter by enacting the Shelter Afrique Act, which, incidentally, only expressly provided for tax rather than judicial immunity. The question was whether in light of Kenya's new 2010 Constitution which in Article 2(6) provides that, '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution', the courts could treat the ratified constitutive Charter as an independent source of municipal law and whether, that being the case, the judicial immunity conferred by the constitutive Charter contravened Ms. Kandie's constitutional right of access to justice under Article 48 of the 2010 Kenyan Constitution.

The Supreme Court held that Article 2(6) 'does not ... distinguish treaties and conventions ratified before or after the Constitution of 2010, and therefore, in this particular instance, the agreements and Conventions that Kenya entered with Shelter Afrique, although ratified before 2010, are in force, have remained unrevoked, and therefore, form part of the laws of Kenya, only subject to the Constitution.'⁶⁴ With this proclamation of constitutional supremacy over international treaties, it is safe to deduct that Kenyan courts will only apply the EAC Treaty insofar as it is consistent with the Kenyan Constitution, sustaining the contention that in the perception of national courts the doctrine of primacy of Community law – itself derived from an international treaty and proclaimed by an international court – cannot apply to national constitutions.

This case law shows national judicial determination to confine the doctrine of primacy of Community law to ordinary legislation, with national constitutions remaining unfettered by Community law. It remains to be seen whether national courts in the other Partner States will adopt a similar approach, although all indications are that they will, precisely because all Partner States' Constitutions entail constitutional supremacy clauses.⁶⁵ However, the EACJ has equally showed no appetite for pushing the boundaries of Community law

⁶³ Ambani (n 39).

⁶⁴ *Karen Njeri Kandie* (n 39), para 41, 19.

⁶⁵ See Articles 228, 231 and 296 Burundi Constitution; Article 2 Kenyan Constitution; Article 3 Rwandan Constitution; Article 2 Ugandan Constitution; Article 3 South Sudan Constitution; and Article 4(4) Tanzanian Constitution Tanzania – although the supremacy proviso in the Tanzanian Constitution is obliquely rather than expressly put. Article 4(4) requires all executive, legislative, and judicial power to be discharged in accordance with the Constitution, thereby establishing its supremacy albeit in non-express terms. See J. Limpitlaw, *Media Law Handbook for Southern Africa* (Vol. 2, Konrad-Adenauer-Stiftung Regional Media Programme, 2013) 540.

beyond constitutional parameters. This, coupled with national courts emerging reverence for international law, may deliver a future of jurisprudential alignment between the national and Community legal systems anchored, as the next Part will show, on mutual institutional respect and commitment to international obligations.

7. The EACJ's Judicial Restraint

Although the question of primacy between Community law and national constitutions has not come squarely before the EACJ,⁶⁶ that Court's insistence on the supranational status of Community law, as discussed in Part 3, above, entails an ostensible perception of Community law's superiority over all national laws, including national constitutions.⁶⁷ Indeed, in *Hon. Justice Malek Malang Malek v Attorney General of South Sudan*,⁶⁸ the EACJ held that a breach by a Partner State of its Constitution is a breach of the EAC Treaty as Articles 6(d) and 7(2) EAC Treaty requires Partner States to uphold the rule of law, including their Constitutions. Yet it must be quickly added that the EACJ has shown exceptional judicial restraint when dealing with matters of extreme political or constitutional sensitivity, signalling a tacit acknowledgment that Community law, like all other systems of law, cannot exist in a vacuum – it will occasionally be entangled with politics or constitutionalism – and, in so doing, revealing the Court's deepest reverence for the Partner States' constitutional systems.⁶⁹

An example of the Court's judicial restraint amidst immense political sensitivity is *East African Law Society & others v Attorney General of Kenya & others (Treaty Amendments No. 2)*.⁷⁰ The applicants challenged the Treaty amendments triggered by the EACJ's ruling in *Prof. Anyang'Nyong'o v Attor-*

⁶⁶ In some cases, the question has been dealt with indirectly and quite unsatisfactorily. See *East African Civil Society Organization Forum v Attorney General of Burundi & Ors* [2016] EACJ Reference No. 2 of 2015; *Legal Brains Trust Ltd v Attorney General of Uganda (No. 2)* [2011] EACJ Appeal No. 4 of 2012; and *Henry Kyarimpa (No. 3)* (n 9).

⁶⁷ See *Henry Kyarimpa (No. 3)* (n 9).

⁶⁸ [2020] EACJ Reference No. 9 of 2017.

⁶⁹ See M. T. Taye, 'The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court' (2019) *African Journal of International and Comparative Law* 27 3 357, 369.

⁷⁰ [2008] EACJ Reference No. 3 of 2007.

ney General of Kenya & others (No. 1),⁷¹ where that Court had granted an interim injunction against the swearing-in of Kenya's EALA representatives pending determination of the main reference challenging the consistency with the EAC Treaty of the national election rules under which the legislators had been selected.⁷² That decision had been received with contempt by Kenyan politicians and the Court was severely rebuked for overstepping its mandate,⁷³ prompting immediate amendments to its jurisdiction and to the grounds of suspension or dismissal of its Judges which in turn were challenged by the East African Law Society for breaching the EAC Treaty's principle of people-centred integration insofar as there had been no Community-wide citizen or civil society consultation on the amendments.

The EACJ was now faced with a task of balancing legal principle with genuine political concerns regarding another high-handed reaction by the Partner States that could potentially erase the Court's role in the integration process.⁷⁴ It went for the middle by ruling that the principle had been breached, condemning that breach in very strong terms, but stopping short of annulling the amendments by invoking the doctrine of prospective annulment by which the Court promised to not entertain similar procedural shabbiness in the future.⁷⁵ Accordingly, '[b]y declaring that the amendment process infringed the EAC Treaty, the EACJ ensured the preservation of the core shape of Community law and by, at the same time, applying the doctrine of prospective annulment for what were abundantly legitimate reasons, the Court ensured a fair and practical outcome for the development of that law, knotting ... a neat win-win dovetail of the political and jurisprudential forces that often characterise the initial stages of regional integration'.⁷⁶

⁷¹ [2006] EACJ Reference No. 1 of 2006.

⁷² See *Prof. Anyang'Nyong'o (No. 2)* (n 11).

⁷³ See J. Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy', (2013) *Duke Journal of Comparative & International Law* 24 259.

⁷⁴ It turned out the stakes were certainly high as only a few months later the Southern African Development Community Tribunal in Windhoek was indefinitely suspended by the Member States following a pernicious ruling against Zimbabwe in a case challenging its land reforms for contravening the SADC Treaty 1992. See *Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe* (2/2007) [2008] SADCT 2.

⁷⁵ For another application of the doctrine of prospective annulment by the Court, see also, *Calist Mwatela & Ors v East African Community* [2006] EACJ Application No. 1 of 2005, another sensitive one-of-a-kind case pitting the Community's legislature against its executive with the judiciary in the middle in which the Court managed to pull off another fine balance and avert a potential institutional crisis that was not needed only six years after the EAC Treaty had come into force.

⁷⁶ Ssemmanda (n 18), 229.

On the constitutional front, similar caution has prevailed in the Court's adjudication of disputes involving an interface between Community law and national constitutions, in particular *East African Civil Society Organizations Forum (EACSOF) v Attorney General of Burundi & others*.⁷⁷ At the centre of this dispute was a decision of the Constitutional Court of Burundi – the highest court of the land on constitutional matters – that okayed the incumbent President's decision to contest for a third term of office. That court had found that since the incumbent President had served his first term under a special post-transition mechanism before serving a second term under direct universal suffrage, he was eligible to serve a final term as Burundi's Constitution allowed a President serving under direct universal suffrage to stand for re-election once. The EACJ in an initial exhibition of respect for national judicial decisions – particularly those with a constitutional bearing – declined to entertain the dispute on the ground that it lacked jurisdiction to hear appeals from national courts,⁷⁸ but on appeal the EACJ Appellate Division found that the EACJ had jurisdiction to adjudicate questions involving Partner States' adherence to Community law, whether the impugned action was administrative, legislative or judicial, and ordered a retrial.⁷⁹

On that basis, the EACJ reconsidered the case, accepted jurisdiction but found that its jurisdiction to determine the international responsibility of states arising from their judicial decisions could not be invoked in this case as the criteria, based on its consideration of international law, had not been met, that is: (a) that the impugned judicial decision depicted on the face of the record outrage, bad faith and wilful dereliction of judicial duty; and, (b) that no or manifestly insufficient action had been taken by the appropriate judicial disciplinary body to redress the judicial outrage. In addition, the Court, in line with the EACJ Appellate Division's ruling, highlighted that its jurisdiction in these circumstances did not extend to setting aside the impugned decision but was limited only to assessing compliance by the relevant Partner State – through the decision of its court – with Community law, leaving any practical implementation of its decision in such circumstances to national courts themselves through the doctrine of direct effect.⁸⁰

⁷⁷ [2019] EACJ Reference No. 2 of 2015.

⁷⁸ See *East African Civil Society Organizations Forum (EACSOF) v Attorney General of Burundi & others* [2016] EACJ Reference No. 2 of 2015.

⁷⁹ See *East African Civil Society Organizations Forum (EACSOF) v Attorney General of Burundi & others* [2018] EACJ Appeal No. 4 of 2016.

⁸⁰ Compare *Case C-224/01 Köbler v Austria* [2003] ECR I-23.

Another example of the EACJ's judicial restraint in cases involving constitutional mosaic where the Court has displayed its highest estimation for decisions of the most superior courts of the Partner States, which are a fundamental part of any State's constitutional structure, whenever the Court has had to evaluate them – through the lens of state responsibility in international law – in disputes brought against Partner States under the EAC Treaty's rule of law and good governance provisions,⁸¹ is *Manariyo Desire v Attorney General of Burundi*.⁸² The EACJ declined to invoke Burundi's state responsibility arising out of a decision of its Supreme Court, on the ground that the alleged procedural irregularities that underpinned the impugned judicial decision did not meet the standard of a 'blatant, notorious and gross miscarriages of justice' required to invoke a State's responsibility at international law for the decisions of its national courts.

East African Civil Society Organizations Forum,⁸³ *Manariyo Desire*,⁸⁴ and *Male Mabirizi Kiwanuka v Attorney General of Uganda*⁸⁵ – the on-going reference lodged before the EACJ against Uganda arising from its Supreme Court's decision concerning the constitutional amendment of the presidential age limit – are the only examples of national apex judicial decisions forming the subject of EACJ disputes.⁸⁶ Two themes cut across all: (a) the decisions have been from apex national courts; and (b) the national questions they determine have been fundamentally constitutional. In those circumstances, it would seem that the day is not far when the EACJ will have to specifically adjudicate on the primacy between Community law and national constitutions.⁸⁷ If the EACJ's restrained approach is sustained, it may be that the Court will continue to steer clear of assessing national courts' decisions, especially where the decision is from a national apex court and concerns purely constitutional matters. It may equally be that the EACJ will seek to strike a balance between its standard conception of the status of Community law on the one hand and, on the

⁸¹ See Articles 6(d) and 7(2) EAC Treaty, compare Article 30(1) EAC Treaty.

⁸² [2016] EACJ Reference No. 8 of 2015.

⁸³ *East African Civil Society Organizations Forum* (n 77, 78 and 79).

⁸⁴ *Manariyo Desire* (n 82).

⁸⁵ See *Male Mabirizi Kiwanuka v Attorney General of Uganda* EACJ Reference No. 6 of 2019.

⁸⁶ A new reference partly concerning a decision from Uganda's High Court has recently been filed, see *Initiatives pour la Paix et les Droits Humains (iPeace) v Attorney General of Uganda* EACJ Reference No. 19 of 2020.

⁸⁷ See T. Milej, 'East African Court of Justice: A Midwife of the Political Federation? The New Case-Law on the Remedies Awarded by the Court' 22 October 2019, *Afronomicslaw*.

other hand, the prevailing attitudes of national courts concerning the hierarchy of their national constitutions.

That said, national courts have portrayed their commitment to facilitating their States' implementation of ratified international treaties, of which the EAC Treaty is among, in turn contributing to the emerging local jurisprudence on international law – in line with the significant contribution made by African States to the development of international law generally,⁸⁸ as will be illustrated in the next Part.

8. The Role of International Law

There is an emerging deference for international law among national courts in the Partner States, placing Community law – itself a manifestation of international law through the EAC Treaty and according to the EACJ's interpretation as demonstrated in Part 3, above – in a favourable position regarding the national judicial reservation of constitutional supremacy. For example, in *Karen Njeri Kandie*,⁸⁹ the Kenyan Supreme Court declined to interpret the *Shelter Afrique Act* – the international organization's incorporating legislation – in a way that would contravene a clear obligation in the organization's constitutive Charter. It will be recalled that the incorporating legislation provided for tax immunity only whereas the constitutive Charter had specifically declared judicial immunity for senior staff. The Supreme Court held that, 'by virtue of Article 2(6) of the Constitution, the *Shelter Afrique Act* cannot be read to be derogating from the obligations Kenya entered into at the time of ratifying the relevant agreements. This is irrespective of the fact that the said agreements and conventions were concluded before the promulgation of the [2010] Constitution.'⁹⁰ By so holding, the court – the highest of the land – revealed its determination to uphold Kenya's international obligations, which might suggest that even within the context of a constitutional dispute an international treaty such as the EAC Treaty will not quickly be dismissed, although there can be no doubt from the court's ruling that ratified international treaties are ultimately subject to the Kenyan Constitution.

⁸⁸ See O. D Akinkugbe, 'Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law', (2019) *ICSID Review* 34 2 434.

⁸⁹ *Karen Njeri Kandie* (n 39).

⁹⁰ *Karen Njeri Kandie* (n 39), para 58, 27.

In similar spirit, in *Uganda v Thomas Kwoyelo*,⁹¹ the Ugandan Supreme Court while dealing with Uganda's obligations under the 1949 Geneva Conventions stressed that, 'when a country commits itself to international obligations, one must assume that it does so deliberately, lawfully and in its national interest. By the time the State goes through all the procedures of ratification and domestication, it must have seriously considered its overall national interest in the context of its role as a member of the United Nations. Therefore, a State should not easily shun its obligations as and when it wishes to.'⁹² This case, like *Karen Njeri Kandie*,⁹³ entailed a constitutional question. A captured rebel leader had argued that denial of amnesty for his rebel activities when others like him had previously been granted amnesty was a contravention of his constitutional right to equal treatment and freedom from discrimination.⁹⁴ The Supreme Court, overturning a Constitutional Court ruling in his favour,⁹⁵ held that there was no discrimination as the petitioner's circumstances and impugned actions were distinct from his amnestied colleagues. Yet again, this ruling – from the highest court of the land – is another illustration of national courts' esteemed regard for international law and their States' obligations under that legal order, suggesting, like the Kenyan Supreme Court in *Karen Njeri Kandie*, that even within the context of a constitutional dispute an international treaty such as the EAC Treaty will not quickly be dismissed, although the court, like its Kenyan counterpart, left no doubt that international treaties binding on Uganda are ultimately subject to the Ugandan Constitution.

A final illustration is *East African Development Bank v Blueline Enterprises Ltd*,⁹⁶ where it will be recalled the Tanzanian Court of Appeal – the highest court of the land – declined to dishonour its obligations under an international Treaty by virtue, incidentally, of an EAC Treaty provision requiring Partner States to ensure fulfilment of their international obligations.⁹⁷

These positive national judicial attitudes to international law promulgated by no less than the apex national courts in three different Partner States – Kenya, Uganda and Tanzania – buffer the national judicial resistance to

⁹¹ [2015] Constitutional Appeal No. 1 of 2012 UGSC 5.

⁹² *Thomas Kwoyelo* (n 91), 35.

⁹³ *Karen Njeri Kandie* (n 39).

⁹⁴ Article 21 Ugandan Constitution.

⁹⁵ See *Thomas Kwoyelo v Uganda* [2011] UGCC 10.

⁹⁶ *Blueline Enterprises* (n 43).

⁹⁷ Article 130(1) EAC Treaty.

Community law by acknowledging, on the one hand, the constitutional justification of that resistance whilst nudging, on the other hand, lower national courts to apply serious balance and consideration for their States' international obligations when determining such disputes. On that basis, and insofar as Community law is itself a manifestation of international law through an international treaty – the EAC Treaty – and according to the EACJ's interpretation as demonstrated in Part 3, above, it can be anticipated that in the context of any constitutional dispute before national courts involving a question of Community law, a certain reverence will be displayed by those courts. Equally, on the basis of the EACJ's judicial restraint analysed in Part 7, above, and insofar as national constitutions are the ultimate premise of Community law's application in the Partner States' legal regimes, it can be anticipated that in the context of any Community law dispute before the EACJ involving a question of constitutional supremacy, a generous amount of judicial restraint will be displayed by that Court.

9. Conclusion

With the EAC Treaty, its Protocols, EALA Acts, Council Directives and Regulations and EACJ jurisprudence, there is now an ascertainable *acquis communautaire* in the EAC, regarded as Community law. This body of law has been adopted domestically by the Partner States through relatively receptive legislative mechanisms, and national courts have conferred a practical fluidity to its domestic application subject only to national constitutions which, reading from the EACJ's present mood, is not a major point of contention, although richer discourse on that question is a future inevitability. For now, however, it can be stated that Community law has, through national legislation and courts, been 'pulled' into the legal systems of the Partner States while to a limited extent – on the ground alone of constitutional supremacy – Community law has been 'pushed' away from those legal systems.

TOWARDS A HARMONISED ANTI-MONEY LAUNDERING APPROACH IN THE EAST AFRICAN COMMUNITY

*Denis Wangwi Moroga**

Abstract

Article 5 of the Treaty for the Establishment of the East African Community (EAC) sets out four main stages of integration, namely, a customs union, a common market, a monetary union, and ultimately a political federation. Implementation of each of the stages of integration blurs national boundaries, paving way for free movement of persons, goods, services, and capital leading to increased trade and economic development. However, without proper structure to monitor cross border movements, the integration creates an avenue for criminals to move proceeds of crime freely within the region. For instance, several reports by the Sentry revealed that significant proceeds of crimes from South Sudan are laundered and invested in Kenya and Uganda. Despite these revelations, the EAC Partner States are yet to take joint measures to combat money laundering (ML). Further, the existing national anti-money laundering (AML) laws are divergent and characterised by enforcement deficits. Against this background, this paper makes a case for the need to jointly combat ML and its predicate offences among the Partner States and at the EAC level. Further, it audits the AML statutes of EAC Partner State, highlighting the discrepancies in the criminalisation of ML and the sanctions regime. The paper calls for the adoption of a more harmonised and proactive AML response within the EAC.

Key words: Anti-money Laundering, Predicate Crimes, Criminal Sanctions, Administrative Sanctions, Harmonisation, Corruption

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